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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~548~~ 16

ALFRED E. BUTLER,

Appellant,

against

STATE OF MICHIGAN,

Appellee.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF THE NOTING OF PROBABLE JURISDICTION AND OF APPELLANT'S POSITION AS TO THE UNCONSTITUTIONALITY OF THE MICHIGAN STATUTE INVOLVED

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Interest of American Book Publishers Council, Inc.

The American Book Publishers Council, Inc. is a membership corporation of which most of the leading publishers of books of general circulation and leading university presses are members. It is estimated that the 132 members of the Council publish and distribute not less than 90% of all general books. Among these publishers are Doubleday & Company, The Macmillan Company, McGraw-Hill Book Company, Inc., Charles Scribner's Sons, Harper & Brothers, Grosset & Dunlap, Inc., Little Brown & Co., Random House,

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* Submitted on consent of the parties.

Inc., The Viking Press and Alfred A. Knopf, Inc.; among the university presses are those of Cornell, Columbia, Harvard, Yale, Princeton, North Carolina, Minnesota, Oklahoma, California and Stanford.

We should like to make crystal clear that the members of the American Book Publishers Council, Inc. deplore obscenity and do not oppose legislation seeking to proscribe it, provided constitutional guaranties are not thereby violated. By the very nature of their business, they have a unique interest in the preservation of freedom of the press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. Therefore, the Council feels impelled to urge that the statute here involved constitutes an unwarranted abridgment of the constitutional guaranty of freedom of the press. For this reason it is respectfully urged that probable jurisdiction be noted * and that the statute be held invalid.

The Michigan Statute Here Under Consideration

> "Any person who shall import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writ-

* It is to be noted that appellee consented to appellant's application for leave to appeal to the Michigan Supreme Court on the ground that "the issues involved in this case are of great public interest," and that a "clarification of the language of" the statute was "necessary."

ing, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor." (Sec. 28.575, Michigan Statutes Annotated [Compiled Laws of 1948, as amended by Act 74 of the Public Acts of 1953].)

Issues on This Appeal

The American Book Publishers Council, Inc. submits that the Michigan statute involved on this appeal presents an unconstitutional violation of the rights guaranteed by the First and Fourteenth Amendments in that:

(A) It unduly restricts freedom of the press, since even though a book *as a whole* may not be obscene, it renders publication criminally actionable if the book merely *contains* any proscribed language;

(B) It fails to comply with the constitutional requirement that criminal statutes set forth ascertainable and definite standards of conduct therein proscribed; and

(C) Although the statute is clearly aimed at the protection of our youth and the alleged standard which it adopts is limited to the effect on youth, its criminal sanctions apply indiscriminately even though no young person be involved.

Argument

A.

The statute proscribes all publications *containing* obscene language such as tend "to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth". Obviously, under such wording the inclusion of *any* such proscribed language in a publication would be sufficient to impose criminal liability,

even though the publication, judged as a whole, might not be considered obscene.

Although this Court has not heretofore considered the precise problem here presented, various of our State and Federal courts as well as other authorities, have held that such a provision constitutes an unconstitutional infringement upon freedom of the press. Thus, in *State* v. *Lerner* (Ohio C. P. 1948), 81 N. E. 2d 282, the Court of Common Pleas of Ohio dealt with precisely the type of statutory provisions here involved. There the law was directed at any "book, pamphlet, paper, magazine not wholly obscene but *containing* lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument or article of an indecent or immoral nature * * *." The Court, referring to *containing* statutes or statutes prohibiting *any* obscenity, declared such provisions to be violative of the constitutional guaranty of freedom of the press, stating:

> "* * * these 'obscene literature' statutes constitute an invalid exercise of the police powers and trespass beyond all reason in the field reserved for the press." (p. 288).
>
> (See also *New American Library* v. *Allen* (D. C., N. D. Ohio, E. D. 1953), 114 F. Supp. 823, 830-831.)

The Court in the *Lerner* case was led to its conclusion from its acceptance of the rule that the word "obscenity" in "obscenity" statutes must be construed as requiring that the book be viewed as a whole and held to be obscene only when such obscenity is the "dominant feature or effect". Thus, the Court stated (p. 287):

> "My conclusion is that an 'obscene book' must be held to be one 'wholly obscene' and that necessarily in testing a literary work for 'obscenity' it must be viewed in its entirety and only when and if the 'obscene' contents constitute the dominant feature or effect does it fall within the forbidden class."

The weight of recent decisions is completely in line with this holding. Thus, in *United States* v. *One Book Entitled Ulysses* (C. C. A. 2d 1934), 72 F. 2d 705, 707, Judge Augustus N. Hand made it clear that

> "The question in each case is whether a publication taken as a whole has a libidinous effect."

Similarly, in *Parmelee* v. *United States* (C. A., D. C., 1940), 113 F. 2d 729, 731, 737, the opinion referred to the standard of "any" obscenity, stating:

> "But more recently this standard has been repudiated, and for it has been substituted the test that a book must be considered as a whole, in its effect, not upon any particular class, but upon all those whom it is likely to reach."

The Court went on to say at page 737:

> "The determining question is, in each case, whether a publication, taken as a whole, has a libidinous effect."

See also *Walker* v. *Popenoe* (C. A., D. C., 1945), 149 F. 2d 511, 512; *United States* v. *Levine* (C. C. A., 2d, 1936), 83 F. 2d, 156, 157.

The conclusion that the *containing* standard is an unconstitutional standard for either statute or judicial determination is affirmed by other authority as well. Thus, as recently as March 1954, in an exhaustive treatment of the law of obscenity (covering 100 pages) entitled "Literature, the Law of Obscenity and the Constitution", 38 Minnesota Law Review 295, Professors William B. Lockhart and Robert C. McClure of the University of Minnesota Law School, stated:

> "We believe the constitutional standard requires that a book be judged as a whole, rather than by isolated words or passages. Statutes that authorize a finding of obscenity based only on a part of the book are to that extent unconstitutional, as are judgments of obscenity similarly based. It is not possible for a court

> to give the requisite consideration to the value of a book, or to the effect of suppressing the book upon freedom of expression in literature, without considering the entire book and the relationship of the disputed passages to its theme. To permit a book to be condemned as obscene solely because of isolated words or passages ripped from the total structure of the work would result in depriving society of the value of the particular book, and the value of freedom of expression through literature, without judicial consideration of the value of what is being destroyed." (p. 392).

The statute in question prohibiting the sale and distribution of a book *containing* obscene language makes unnecessary the consideration of the book as a whole, but instead makes possible the condemnation of a book on the basis of a single isolated passage. This, we contend, is an unwarranted limitation upon the freedom of the press.

* * * * * *

Appellee's motion to dismiss this appeal substantiates the argument herein made. Thus, counsel for the appellee seek to avoid the effect of the word "containing" in the statute here under attack, contending that "the Michigan law when properly construed", requires a consideration of the book as a whole (Appellee's Br., pp. 10-11). Were this strained interpretation within the proper bounds of statutory construction and had it been so construed, our objection to the statute in this regard would have been obviated. The fact is, however, that the Michigan Court has already construed the "containing" provision in accordance with its plain meaning, as follows:

> "However, the Court does have to find that it is in violation of this particular Statute because the Statute does say that *it is sufficient to contain* lewd, immoral, obscene and lascivious language or description." (Italics supplied.) (Appendix A to Appellant's Jurisdictional Statement, p. 16.)

Indeed, the testimony of expert witnesses at the trial herein, directed at isolated passages, was predicated precisely upon the Court's construction of the statute as a "containing" one.

B.

Under the statutory provisions above set forth, the "language, * * * books", etc., complained of must be such as tend "to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth" in order to come under its prohibition.

It is respectfully submitted that this language is so vague and indefinite as to afford no "ascertainable standard" as to whether or not specific published matter violates the law. This Court has repeatedly condemned such vague statutes particularly when they seek to limit the constitutional guaranty of freedom of the press. Thus, in *Winters* v. *New York* (1947), 333 U. S. 507, the statute under consideration was construed as forbidding "the massing of stories of bloodshed and lust in such a way as to incite to crime against the person" (p. 514). This Court held that the standard of definiteness required for such a statute had not been met and that the statute was unconstitutional. To the same effect, *Burstyn* v. *Wilson* (1952), 343 U. S. 495; *Superior Films, Inc.* v. *Department of Education* (1954), 346 U. S. 587.

Indeed, this Court has already found it necessary to hold unconstitutionally vague a statute with virtually the identical language objected to in the instant statute. Thus, in *Commercial Pictures Corp.* v. *Regents of the University of the State of New York* (1954), 346 U. S. 587, this Court invalidated a statute which sought to prevent the exhibition of a motion picture on the ground that it was "immoral" and "would tend to corrupt morals". To the same effect, *Holmby Productions Inc., et al.* v. *Vaughan, et al.* (1955), ... U. S. ....., 100 L. ed. (Advance p. 73).

In the light of the clear rulings of this Court, it is submitted that this statute fails to meet the standards of definiteness required and must be held to be invalid.

C.

The obvious purpose of the statutory provisions herein questioned is the protection of the morals of our youth. Certainly, such purpose is within the scope of the police power of the state if such power is properly utilized. Basic to the requirement of due process, however, is the principle that the means employed to effect the exercise of such police power should be neither arbitrary nor oppressive but should bear a real and substantial relation to such end. *Treigle* v. *Acme Homestead Assoc.* (1936), 297 U. S. 189, 197; *Liggett Co.* v. *Baldridge* (1928), 278 U. S. 105, 111-112.

However, despite the narrow purpose of the statute in its limitation to only a segment of our society, namely, our youth, the proscriptions contained are such that a vital constitutional freedom is severely curtailed, though no youth at all may be involved. Thus, a bookseller of a book found to be offensive to the statutory provision may be prosecuted for selling such book to an adult. This was precisely the situation in the present case.

Indeed, the direct effect of the operation of this statute is to lower the permissible standard of adult reading to a child's level. Certainly what might corrupt a child in many instances would not corrupt an adult. Yet all adults would be deprived of books, not obscene by accepted judicial standards, but * * * "tending to the corruption of the morals of youth." *

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* Under this very statute the Prosecuting Attorney of Wayne County, Michigan, has deprived its adult population of the right to read, for example, the following well-known books by ruling that they violate the statute:

A World I Never Made	James T. Farrell
The Farmers Hotel	John O'Hara
Across the River and Into the Trees	Ernest Hemingway
The Catcher in the Rye	J. D. Salinger
1919	John Dos Passos
Battle Cry	Leon Uris
Psychology of Sex	Havelock Ellis

It seems clear, therefore, that the State has unnecessarily invoked a weapon of broad application in order to effectuate its narrow purpose. Under such circumstances, the means adopted bears no real and substantial relation to the end sought and constitutes an arbitrary and oppressive deprivation of the right of freedom of the press.

CONCLUSION

We respectfully urge that this Court note probable jurisdiction and declare unconstitutional the Michigan statute here involved.

Respectfully submitted,

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